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6 IN THE UNITED STATES DISTRICT COURT

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10 WILBUR LYNN McCLORE, No. C 04-2101 WHA (PR)

11 Petitioner,  
12 vs.  
13 JILL BROWN, Warden,  
14 Respondent.

15 \_\_\_\_\_/ **ORDER DENYING PETITION  
FOR WRIT OF HABEAS  
CORPUS**

16 This is a habeas corpus case filed by a state prisoner pursuant to 28 U.S.C. 2254. The  
17 petition is directed to a denial of parole.

18 The court ordered respondent to show cause why the writ should not be granted.  
19 Respondent has filed an answer and a memorandum of points and authorities in support of it,  
20 and has lodged exhibits with the court. Petitioner has responded with a traverse. For the  
21 reasons set forth below, the petition is **DENIED**.

22 **STATEMENT**

23 In 1987 petitioner was convicted of kidnaping for robbery, a violation of Section 209(b)  
24 of the California Penal Code, and sentenced to prison for a term of life plus one year (Ans.,  
25 Exh. A).<sup>1</sup> Petitioner was owed money by someone he ran into at a Wendy's restaurant, who  
26 later was his co-defendant (Exh. C (6-7-01 parole hearing) at 10). The co-defendant picked out  
27 a woman who was getting out of her car, pushed her back into the car, grabbed her by the  
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<sup>1</sup> All further citations to "Exh." in this order are to the exhibits attached to the respondent's answer.

1 throat, struck her in the face, and demanded money (Exh. B (probation report) at 2). Petitioner  
2 manhandled the victim into the back seat, got into the passenger seat, and warned her that they  
3 had a gun and would kill her if she “made a stupid move.” (*Ibid.*) They drove to a shopping  
4 mall where they made the victim go into two stores with them and buy them clothes and shoes  
5 (*id.* at 3). After leaving the mall they pulled over to the side of a freeway, where petitioner took  
6 the victim’s jewelry and forced her out of the car (*ibid.*).

7 On June 7, 2001, after a hearing before the Board of Prison Terms (“Board”), during  
8 which petitioner was represented and was given an opportunity to be heard, the Board found  
9 petitioner unsuitable for parole (Exh. C at 55-60). The Board based its decision upon the nature  
10 of petitioner’s conviction offenses, his escalating pattern of criminal activity, his failure to  
11 benefit from previous attempts to deter him from criminality (he was on parole at the time of the  
12 current offense), his prior criminal activity, failure to sufficiently participate in self-help  
13 programs, lack of sufficient employment plans, receipt of disciplinary reports in the prison, and  
14 need for continued therapy (*ibid.*).

15 On October 23, 2003, the Board again denied parole, for essentially the same reasons  
16 (Exh. F at 47-53). Petitioner challenges both denials in this petition. Because the record and  
17 the reasons for the denial were nearly identical, they will be discussed together with differences,  
18 where they exist, noted.

## DISCUSSION

## **A. STANDARD OF REVIEW**

21 A district court may not grant a petition challenging a state conviction or sentence on the  
22 basis of a claim that was reviewed on the merits in state court unless the state court's  
23 adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an  
24 unreasonable application of, clearly established Federal law, as determined by the Supreme  
25 Court of the United States; or (2) resulted in a decision that was based on an unreasonable  
26 determination of the facts in light of the evidence presented in the State court proceeding." 28  
27 U.S.C. § 2254(d). The first prong applies both to questions of law and to mixed questions of  
28 law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000), while the second prong

1 applies to decisions based on factual determinations, *Miller-El v. Cockrell*, 537 U.S. 322, 340  
2 (2003).

3 A state court decision is “contrary to” Supreme Court authority, that is, falls under the  
4 first clause of § 2254(d)(1), only if “the state court arrives at a conclusion opposite to that  
5 reached by [the Supreme] Court on a question of law or if the state court decides a case  
6 differently than [the Supreme] Court has on a set of materially indistinguishable facts.”  
7 *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an “unreasonable application of”  
8 Supreme Court authority, falls under the second clause of § 2254(d)(1), if it correctly identifies  
9 the governing legal principle from the Supreme Court’s decisions but “unreasonably applies  
10 that principle to the facts of the prisoner’s case.” *Id.* at 413. The federal court on habeas  
11 review may not issue the writ “simply because that court concludes in its independent judgment  
12 that the relevant state-court decision applied clearly established federal law erroneously or  
13 incorrectly.” *Id.* at 411. Rather, the application must be “objectively unreasonable” to support  
14 granting the writ. *See id.* at 409.

15 “Factual determinations by state courts are presumed correct absent clear and  
16 convincing evidence to the contrary.” *Miller-El*, 537 U.S. at 340. This presumption is not  
17 altered by the fact that the finding was made by a state court of appeals, rather than by a state  
18 trial court. *Sumner v. Mata*, 449 U.S. 539, 546-47 (1981); *Bragg v. Galaza*, 242 F.3d 1082,  
19 1087 (9th Cir.), *amended*, 253 F.3d 1150 (9th Cir. 2001). A petitioner must present clear and  
20 convincing evidence to overcome § 2254(e)(1)’s presumption of correctness; conclusory  
21 assertions will not do. *Id.*

22 Under 28 U.S.C. § 2254(d)(2), a state court decision “based on a factual determination  
23 will not be overturned on factual grounds unless objectively unreasonable in light of the  
24 evidence presented in the state-court proceeding.” *Miller-El*, 537 U.S. at 340; *see also Torres*  
25 *v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

26 When there is no reasoned opinion from the highest state court to consider the  
27 petitioner’s claims, the court looks to the last reasoned opinion. *See Ylst v. Nunnemaker*, 501  
28 U.S. 797, 801-06 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th Cir. 2000).

1        **B. ISSUES PRESENTED**2        **1. Liberty Interest in Parole**

3            The Fourteenth Amendment provides that no state may “deprive any person of life,  
4            liberty, or property, without due process of law.” U.S. Const., amend. XIV, § 1. Respondent  
5            contends that California prisoners have no liberty interest in parole, so have no due process  
6            rights in relation to the grant or denial of it.

7            In *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1  
8            (1979), the Supreme Court found that the inmates had a liberty interest in discretionary parole  
9            that was protected by the Due Process Clause. The right was created by the “expectancy of  
10           release provided in [the Nebraska parole statute.]” That statute provided that the parole board  
11           “shall order” release of eligible inmates unless that release would have certain negative impacts.  
12           *Id.* at 11–12. The Supreme Court returned to the issue in *Board of Pardons v. Allen*, 482 U.S.  
13           369 (1987). There it held that a similar liberty interest was created even though the parole  
14           board had great discretion. *Id.* at 381. For parole decisions, this mode of analysis survived the  
15           Supreme Court’s later rejection of it for prison disciplinary decisions in *Sandin v. Conner*, 515  
16           U.S. 472 (1995). *Biggs v. Terhune*, 334 F.3d 910, 914 (9th Cir. 2003) (*Sandin* “does not affect  
17           the creation of liberty interests in parole under *Greenholtz* and *Allen*.”).

18           While there is “no constitutional or inherent right of a convicted person to be  
19           conditionally released before the expiration of a valid sentence,” *Greenholtz v. Inmates of*  
20           *Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7 (1979), a state’s statutory parole scheme, if it  
21           uses mandatory language, may create a presumption that parole release will be granted when or  
22           unless certain designated findings are made, and thereby give rise to a constitutionally protected  
23           liberty interest, *see Board of Pardons v. Allen*, 482 U.S. 369, 376-78 (1987) (Montana parole  
24           statute providing that board “shall” release prisoner, subject to certain restrictions, creates due  
25           process liberty interest in release on parole); *Greenholtz*, 442 U.S. at 11-12 (Nebraska parole  
26           statute providing that board “shall” release prisoner, subject to certain restrictions, creates due  
27           process liberty interest in release on parole). In such a case, a prisoner has liberty interest in  
28           parole that cannot be denied without adequate procedural due process protections. *See Allen*,

1 482 U.S. at 373-81; *Greenholtz*, 442 U.S. at 11-16.

2 Respondent contends that California law does not create a liberty interest in parole. But  
3 California's parole scheme uses mandatory language and is similar to the schemes in *Allen* and  
4 *Greenholtz* which the Supreme Court held gave rise to a protected liberty interest in release on  
5 parole. In California, the panel or board "shall set a release date unless it determines that the  
6 gravity of the current convicted offense or offenses, or the timing and gravity of current or past  
7 convicted offense or offenses, is such that consideration of the public safety requires a more  
8 lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be  
9 fixed at this meeting." Cal. Penal Code § 3041(b). Under the clearly established framework of  
10 *Allen* and *Greenholtz*, "California's parole scheme gives rise to a cognizable liberty interest in  
11 release on parole." *McQuillion v. Duncan*, 306 F.3d 895, 902 (9th Cir. 2002). The scheme  
12 requires that parole release be granted unless the statutorily defined determination (that  
13 considerations of public safety forbid it) is made. *Ibid.*; *Biggs v. Terhune*, 334 F.3d 910, 915-16  
14 (9th Cir. 2003) (finding initial refusal to set parole date for prisoner with fifteen-to-life sentence  
15 implicated prisoner's liberty interest). In sum, the structure of California's parole scheme --  
16 with its mandatory language and substantive predicates -- gives rise to a federally protected  
17 liberty interest in parole such that an inmate has a federal right to due process in parole  
18 proceedings.

19 Respondent relies on *In re Dannenberg*, 34 Cal. 4th 1061 (Cal.), *cert. denied*, 126 S. Ct.  
20 92 (2005), as authority for his contention that the California statute does not create a liberty  
21 interest in parole. This argument has been rejected by the United States Court of Appeals for  
22 the Ninth Circuit. *See Sass v. California Bd. of Prison Terms*, 461 F.3d 1127-28 (2006).

23 Respondent's argument as to liberty interest is without merit.

## 24 2. Some Evidence

25 Petitioner contends that denial of parole was not supported by "some evidence" and thus  
26 violated his due process rights.

27 The Supreme Court has clearly established that a parole board's decision deprives a  
28 prisoner of due process if the board's decision is not supported by "some evidence in the

1 record," or is "otherwise arbitrary." *Iron v. Carey*, 479 F.3d 658, 662 (9th Cir. 2007) (applying  
2 "some evidence" standard used for disciplinary hearings as outlined in *Superintendent v. Hill*,  
3 472 U.S. 445-455 (1985)); *McQuillion*, 306 F.3d at 904 (same). The evidence underlying the  
4 Board's decision must also have "some indicia of reliability." *McQuillion*, 306 F.3d at 904;  
5 *Biggs*, 334 F.3d at 915. The some evidence standard identified in *Hill* is clearly established  
6 federal law in the parole context for purposes of § 2254(d). *See Sass*, 461 F.3d at 1128-1129.

7 Ascertaining whether the some evidence standard is met "does not require examination  
8 of the entire record, independent assessment of the credibility of witnesses, or weighing of the  
9 evidence. Instead, the relevant question is whether there is any evidence in the record that  
10 could support the conclusion reached by the disciplinary board." *Hill*, 472 U.S. at 455; *Sass*,  
11 461 F.3d at 1128. The some evidence standard is minimal, and assures that "the record is not so  
12 devoid of evidence that the findings of the disciplinary board were without support or otherwise  
13 arbitrary." *Sass*, 461 F.3d at 1129 (quoting *Hill*, 472 U.S. at 457).

14 Several recent Ninth Circuit cases have addressed the issue of the Board's use of  
15 evidence from the commitment offense and prior offenses. In *Biggs*, the court explained that  
16 the some evidence standard may be considered in light of the Board's decisions over time.  
17 *Biggs*, 334 F.3d at 916-917. The court reasoned that "[t]he Parole Board's decision is one of  
18 'equity' and requires a careful balancing and assessment of the factors considered . . . A  
19 continued reliance in the future on an unchanging factor, the circumstance of the offense and  
20 conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison  
21 system and could result in a due process violation." *Id.* Although the *Biggs* court upheld the  
22 initial denial of a parole release date based solely on the nature of the crime and the prisoner's  
23 conduct before incarceration, the court cautioned that "[o]ver time, however, should Biggs  
24 continue to demonstrate exemplary behavior and evidence of rehabilitation, denying him a  
25 parole date simply because of the nature of his offense would raise serious questions involving  
26 his liberty interest." *Id.* at 916.

27 The *Sass* court criticized the decision in *Biggs*: "Under AEDPA it is not our function to  
28 speculate about how future parole hearings could proceed." *Sass*, 461 F.3d at 1129. *Sass*

1 determined that it is not a due process violation per se if the Board determines parole suitability  
2 based solely on the unchanging factors of the commitment offense and prior offenses. *See id.*  
3 (prisoner's commitment offenses in combination with prior offenses amounted to some  
4 evidence to support the Board's denial of parole). However, *Sass* does not dispute the argument  
5 in *Biggs* that, over time, a commitment offense may be less probative of a prisoner's current  
6 threat to the public safety.

7 In *Iron*s the Ninth Circuit emphasized the continuing vitality of *Biggs*, but concluded  
8 that relief for Irons was precluded by *Sass*. *See Irons*, 470 F.3d at 664. The Ninth Circuit  
9 explained that all of the cases in which it previously held that denying parole based solely on  
10 the commitment offense comported with due process were ones in which the prisoner had not  
11 yet served the minimum years required by the sentence. *Id.* at 665. Also, noting that the parole  
12 board in *Sass* and *Iron*s appeared to give little or no weight to evidence of the prisoner's  
13 rehabilitation, the Ninth Circuit stressed its hope that "the Board will come to recognize that in  
14 some cases, indefinite detention based solely on an inmate's commitment offense, regardless of  
15 the extent of his rehabilitation, will at some point violate due process, given the liberty interest  
16 in parole that flows from relevant California statutes." *Id.* (citing *Biggs*, 334 F.3d at 917). Even  
17 so, the Ninth Circuit has not said when a complete reliance on unchanging circumstances would  
18 amount to a due process violation.

19 That is not what happened here, however. In both hearings the denials were, as set out  
20 in the statement above, based on not only the characteristics of the crime, in which a young  
21 woman was kidnaped and terrorized, but on that fact that petitioner was on parole at the time he  
22 committed the crime, showing his lack of response to society's attempts to reform him; his  
23 previous criminal record; his receipt of disciplinary rule-violation reports in prison; and other  
24 factors. These events were fairly far in the past, and at some point they would cease to be worth  
25 any weight, under the *Biggs* approach; but at this point, they are evidence supporting denial of  
26 parole.

27 Although petitioner's crime was not as horrific as some life prisoners, and his  
28 psychological reports, which assessed his dangerousness at no more than the average citizen,

1 were favorable factors, that has no impact on whether there was “some evidence” to support the  
2 decisions. *See Hill*, 472 U.S. at 455 (assessment of whether there was ‘some evidence’ to  
3 support a decision does not require weighing of evidence).

4 The evidence supporting the denial constituted “some evidence;” petitioner’s due  
5 process rights were not violated. As a result, the rejection of this claim by the state appellate  
6 courts was not contrary to, nor an unreasonable application of, clearly-established Untied States  
7 Supreme Court authority.

8 **CONCLUSION**

9 The petition for a writ of habeas corpus is **DENIED**. The clerk shall close the file.

10 **IT IS SO ORDERED.**

11  
12 Dated: September 18, 2007.

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14 WILLIAM ALSUP  
15 UNITED STATES DISTRICT JUDGE  
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